

DEC 20 1990

JOSEPH F. SPANIO, JR.
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In The
Supreme Court of the United States
October Term, 1990

CURTIS REED JOHNSON,

*Petitioner and
Cross-Respondent,*

vs.

HOME STATE BANK,

*Respondent and
Cross-Petitioner.*

**Cross-Petition For Writ Of Certiorari
To The United States Court Of
Appeals For The Tenth Circuit**

BRIEF IN OPPOSITION

*W. THOMAS GILMAN
EDWARD J. NAZAR
THOMAS E. MALONE
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A. QUESTION PRESENTED FOR REVIEW

Should the Court grant a writ of certiorari on any of the questions presented for review by the Cross-Petitioner (hereinafter "the Bank") when none of those questions have been decided by the Court below?

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C. TABLE OF AUTHORITIES

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D. STATEMENT OF THE CASE

Johnson disputes two statements made by the Bank in its Statement of the Case. First, the Bank states that "Johnson's Amended Plan provides no payment to unsecured creditors and provides no cure to any arrearages."¹ The reason Johnson's Plan provided for no payments to unsecured creditors was that there were no unsecured creditors. Johnson had previously discharged all unsecured claims and was attempting to reamortize in the Chapter 13 bankruptcy the remaining *in rem* claims against his property. The question of whether an *in rem* claim against a Debtor's property constitutes a "claim" within the meaning of 11 U.S.C. §101(4) is the basic legal issue for which Petitioner seeks a writ of certiorari.

Second, the Bank states that "Johnson's Amended Plan calls for the borrowing of one hundred sixty-three percent (163%) of his estimate of the appraised value of the subject property at the conclusion of the Plan."² It should be emphasized that this is only the Bank's opinion; no such finding was made by the Bankruptcy Court. In previous arguments, the Bank has argued that the Debtor's Plan called for the borrowing of an amount in excess of the value of the collateral which was to be offered as security, however, it should be noted that the Bankruptcy Court agreed with the Debtor and found that the amount to be borrowed was only fifty-six percent (56%) of the market value of the collateral.³ Thus, it

¹ See, Cross-Petition for Writ of Certiorari, p. 7. -

² See, Cross-Petition for Writ of Certiorari, p. 7.

³ See, *In Re Johnson*, Case No. 87-10585, Slip. Op. (Bankr. D. Kan. Apr. 8, 1988), at Appendix 31 to Johnson's Petition for Certiorari, No. 90-693.

should be noted that it is the Bank's *opinion* that Johnson's Amended Plan called for borrowing one hundred sixty-three percent (163%) of the estimated value of the property to be offered as collateral for the loan.

E. SUMMARY OF ARGUMENT

The Bank's Cross-Petition for Certiorari should not be granted because it seeks certiorari on three questions which were not decided by the Court below (in fact, two of the questions presented, feasibility and good faith, have not been decided by *any appellate court* in this case so far) and because the Bank has failed to establish that any of its questions presented for review fit within the considerations governing review on certiorari established at Rule 10 of the Supreme Court Rules.

F. ARGUMENT

None of the Questions Raised by the Bank for Review Have Been Decided by the Court Below.

The Bank argues that this Court should grant certiorari to determine whether the Bankruptcy Court was correct in holding that Johnson's Plan was submitted in good faith and was feasible. Neither the Tenth Circuit Court of Appeals nor the District Court ruled on the questions of good faith or feasibility because it was unnecessary to do so after those courts ruled that Johnson

owed no "debt" to the Bank.⁴ In deciding the issue, this Court would essentially have to review the trial court's record and determine whether its decision is clearly erroneous as those findings are findings of fact.⁵ Such a determination is not appropriate in this case.

The Bank also asks this Court to determine whether the District Court's stay pending appeal was proper given the fact that no funds were ordered to be turned over to the Bank as a condition of the stay. Again, this issue was not addressed by the Court below and is not an appropriate issue to be addressed by this Court.

**The Bank Has Not Raised Any Questions for
Review That Fit Within the Considerations
Governing Review on Certiorari Set Forth in
Rule 10 of the Supreme Court Rules.**

The Bank asks this Court to grant certiorari to review a decision by the Bankruptcy Court on good faith and feasibility and the decision by the District Court on its stay pending appeal to the Tenth Circuit Court of Appeals. Rule 10.1 of the Supreme Court Rules is clear. It indicates that the types of cases this Court should grant certiorari on are those where a decision by a *federal court of appeals* is in conflict with the decision of another federal court of appeals or a state court of last resort. The questions raised by ~~the~~ Bank do not meet the considerations

⁴ See, Johnson's Petition for Certiorari, No. 90-693, for an explanation of the Court's rulings on this issue.

⁵ See, *Matter of Metz*, 820 F.2d 1495 (9th Cir. 1987) and *Education Assistance Corp. v. Zellner*, 827 F.2d 1222 (8th Cir. 1987).

established by the Court in determining when a Cross-Petition for Certiorari should be granted.

The Bank indicates that the District Court's ruling on the stay pending appeal to the Tenth Circuit is in conflict with *United Savings v. Timbers of Inwood Forest*, 484 U.S. 365, 98 L.Ed.2d 740, 108 S.Ct. 626 (1988). The Bank's assertion, however, is incorrect. The issue in *Timbers of Inwood Forest*, *supra*, was whether an unsecured creditor was entitled to receive from the Debtor "monthly payments for the use value of the loan collateral which the bankruptcy's stay prevented [the creditor] from possessing." *Id.*, at 484 U.S. 368, 98 L.Ed.2d 746, 108 S.Ct. 628. Here, the issue has nothing to do with adequate protection or relief from stay. Simply put, the District Court, after reversing the Bankruptcy Court's confirmation of the Debtor's Chapter 13 Plan, granted a stay pending the appeal to the Tenth Circuit Court of Appeals. The issues are not even remotely similar and the District Court's decision does not conflict with the *Timbers*, *supra*, decision.

G. CONCLUSION

For the above and foregoing reasons, Johnson requests that the Court deny the Bank's Cross-Petition for Certiorari.

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